

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

THOMAS E. MULVIHILL (SBN 129906)

E-Mail: Thomas.Mulvihill@lewisbrisbois.com

333 Bush Street, Suite 1100

San Francisco, California 94104-2872

Telephone: (415) 362-2580

Facsimile: (415) 434-0882

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

JERRY GARCIA (SBN 131554)

E-Mail: Jerry.Garcia@lewisbrisbois.com

633 West 5<sup>th</sup> Street, Suite 4000

Los Angeles, California 90071

Telephone: (213) 250-1800

Facsimile: (213) 250-7900

Attorneys for Plaintiff

ATAIN SPECIALTY INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

ATAIN SPECIALTY INSURANCE  
COMPANY,

Plaintiff,

vs.

COMMUNITY REBUILD PARTNERS,  
LLC; COMMUNITY REBUILD ASSET  
HOLDINGS, LLC; BRANDEE  
WINIKOFF, and SHAWN WINIKOFF,

Defendants.

CASE NO.

**COMPLAINT FOR DECLARATORY  
RELIEF**

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COMES NOW Plaintiff ATAIN SPECIALTY INSURANCE COMPANY (“ATAIN” or “Plaintiff”), and alleges as follows:

### **JURISDICTION**

1. This is an action for declaratory judgment pursuant to 28 U.S.C. §2201, in which the amount in controversy exceeds \$75,000, exclusive of costs and interest. (“Instant Action”) This Court has original jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. §§ 1332(a)(1) and (c)(1).

### **VENUE**

2. A substantial part of the events giving rise to the Instant Action and each of the Defendant’s business activities and contacts within this judicial district are sufficient to subject Defendants to personal jurisdiction within this judicial district. Accordingly, venue is proper in the Northern District of California, Oakland Division, pursuant to 28 U.S.C. § 1391(a)(1) and (2), and 28 U.S.C. § 1391(d).

### **PARTIES**

3. ATAIN is, and at all times relevant hereto was, a corporation in good standing, organized and existing under the laws of the State of Michigan with its principal place of business in Farmington Hills, Michigan. Accordingly, ATAIN is a citizen of the State of Michigan for purposes of diversity jurisdiction.

4. ATAIN is informed and believes and based thereon alleges that Defendant COMMUNITY REBUILD PARTNERS, LLC (“CRP”), is a Delaware limited liability company with its principal place of business in California. Accordingly, CRP is a citizen of the States of Delaware and California for purposes of diversity jurisdiction.

5. ATAIN is informed and believes, and based thereon alleges, that Defendant COMMUNITY REBUILD ASSET HOLDINGS, LLC (“CRAH”), is a Delaware Limited Liability Company with its principal place of business in California. Accordingly, CRAH is a citizen of the States of Delaware and California for purposes of diversity jurisdiction.

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6. ATAIN is informed and believes, and based thereon alleges that Defendant BRANDEE WINIKOFF is an individual person who resides in California. Accordingly, BRANDEE WINIKOFF is a citizen of the State of California for purposes of diversity jurisdiction.

7. ATAIN is informed and believes, and based thereon alleges that Defendant SHAWN WINIKOFF is an individual person who resides in California. Accordingly, SHAWN WINIKOFF is a citizen of the State of California for purposes of diversity jurisdiction. BRANDEE WINIKOFF and SHAWN WINIKOFF are collectively referred to as the "WINIKOFFS."

## **FACTUAL ALLEGATIONS**

### **The Underlying Action**

8. On or about November 3, 2017, the WINIKOFFS filed a lawsuit in the Superior Court of the State of California, County of Alameda, Case No. RG17881286, styled *Brandee Winikoff and Shawn Winikoff v. Community Rebuild Partners LLC, et al.* ("Underlying Action"). A First Amended Complaint was filed in the Underlying Action on or about September 25, 2018 ("FAC"). A true and correct copy of the operative FAC is attached hereto as Exhibit A and incorporated by this reference.

9. The Underlying Action presents principally as a suit for construction defects and the failure to disclose such defects to the residence located at 1893 Melvin Road, Oakland, California ("Property"). More specifically, the FAC alleges in relevant part as follows:

12. Plaintiffs are informed and believe and thereon allege that defendants CRP and CRAH owned the real property consisting of a single-family dwelling located at 1893 Melvin Road, Oakland, California (hereinafter, the "Property") between 2014 and August, 2016.

13. In or about June 22, 2016, Plaintiffs and defendant CRAH, on its own behalf, and on behalf of CRP (together "defendant Sellers"), entered into a contract for the purchase and sale of the Property for a purchase price of \$1,795,000, and thereafter modified the contract in accordance with written addenda to the contract. The contract for the purchase and sale of the Property, together with addenda to said contract, are hereinafter referred to as the "Purchase Agreement", a copy of which is attached hereto as Exhibit A, and incorporated in full herein. Among other things, the Purchase

1 Agreement requires the seller to deliver to the buyers fully completed  
2 disclosure documents, which obligated defendant Sellers to disclose to  
3 Plaintiff buyers all known material facts which may impact the value or  
desirability of the Property. Escrow closed on Plaintiffs' purchase of the  
Property on or about August 2, 2016.

4 14. Defendants CRAH and CRP marketed the Property as a  
5 "flawless contemporary remodel" and misrepresented that the Property was  
6 free of defective and malfunctioning conditions, free of conditions that were  
7 not in compliance with applicable building codes, free of water intrusion,  
8 leaks, moisture penetration, mold and mildew, and was free of other  
9 material defects affecting the value and desirability of the Property.  
Plaintiffs are informed and believe and thereon allege that when they made  
the misrepresentations and failed to disclose the defective condition of the  
property as alleged herein, defendants CRAH and CRP had actual or  
constructive knowledge of the defective condition of the Property.

\* \* \* \*

10 18. Plaintiffs moved into the Property on or about August 3, 2016,  
11 after which Plaintiffs discovered among other conditions that adversely  
12 affect the value and desirability of the Property, the following: 1) that the  
13 Property suffers from persistent, serious and extensive water infiltration  
14 problems, 2) that the Property's roofing components, exterior cladding and  
15 stucco, flashing, decks, balconies, windows, and sliding glass doors were  
16 designed, constructed, renovated and installed in a negligent, substandard  
17 and defective manner, and 3) that the Property suffers from multiple other  
design, construction, renovation, installation and environmental hazard  
deficiencies, including, but not limited to, substandard structural, electrical,  
mechanical, HVAC and plumbing systems. Plaintiffs also discovered mold  
and fungal growth after moving in. No disclosure of mold was made to  
Plaintiffs prior to close of escrow.

18 19. Defendants CRAH and CRP made the false, incomplete, partial  
19 and misleading disclosures, misrepresentations, and concealment of material  
facts to Plaintiffs relating to the condition of the Property as alleged above  
in order to induce Plaintiffs to purchase the Property for \$1,795,000.

20 20. Plaintiffs have been damaged as a direct, proximate and legal  
21 result of the wrongful acts and omissions of defendants, and each of them,  
22 as alleged herein, in that: (1) the Property's value was and is substantially  
23 diminished; (2) Plaintiffs have and will incur substantial out-of-pocket  
24 expenditures, inclusive of the cost of consultants, design professionals and  
25 contractors, to investigate and repair the defective and undisclosed  
26 conditions; (3) Plaintiffs have been deprived of the benefit of their bargain  
27 in purchasing the Property, including the loss of future profits from the sale  
of the Property; (4) Plaintiffs have incurred and will continue to incur  
substantial legal fees and costs in enforcing their legal rights' against  
defendants; (5) Plaintiffs have been deprived of the quiet enjoyment and use  
of the Property as a result of the defective conditions; (6) Plaintiffs have  
incurred additional living expenses and will incur relocation and rental  
expenses as a result of the defective conditions.

28 (FAC, pp. 3-5.)

10. Based upon the aforementioned allegations in the FAC, the FAC states causes of action against CRP and CRAH for (1) Breach of Contract, (2) Negligent Misrepresentation, (3) Breach of Civil Code Section 1102 Statutory Duty, (4) Rescission, (5) Negligence, and (7) Breach of Implied Warranty. (The Sixth Cause of Action is alleged against Marell Inspections Services, Inc., which has no claim for coverage under the Policies and for this reason, the cause of action and Marell are not discussed in the Instant Action.)

### THE ATAIN POLICIES

11. ATAIN issued Commercial General Liability Policy No. CIP191939, effective from December 27, 2013 to December 27, 2014 (“2014 Policy”); Policy No. CIP239582, effective from December 27, 2014 to December 27, 2015 (“2015 Policy”); Policy No. CIP275237, effective from December 27, 2015 to December 27, 2016 (“2016 Policy”); and Policy No. CIP308699, effective from December 27, 2016 to December 27, 2017 (“2017 Policy”) (collectively, “Policies”). CRP and CRAH are named insureds under the Policies. Each of the Policies has a \$1 million each occurrence limit subject to a \$2 million general aggregate limit and a \$2 million products/completed operations limit, and a \$1,000 deductible for bodily injury and property damage liability combined. A true and correct copy of the Policies are attached hereto, respectively, as Exhibits B through E, and are incorporated herein by reference.

12. Paragraph **1. Insuring Agreement of Section I – Coverages Coverage A Bodily Injury and Property Damage Liability** of the Policies provides, *inter alia*, that ATAIN will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which the Policies apply; that ATAIN has the right and duty to defend the insured against any “suit” seeking those damages; that ATAIN will have no duty to defend the insured against any “suit” for “bodily injury” or “property damage” to which this insurance does not apply; and that the insurance applies to “bodily injury” and “property damage” only if the “bodily

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injury” or “property damage” is caused by an “occurrence” and occurs during the policy period (“Insuring Agreement requirement”).

13. The Policies contain Exclusion j. (5), which provides in relevant part that: “This insurance does not apply to: . . . That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations” (“Exclusion j.(5)”).

14. The Policies contain Exclusion j. (6), which provides in relevant part that: “This insurance does not apply to: . . . That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it” (“Exclusion j. (6)”).

15. The Policies contain Exclusion l., which provides in relevant part that: “This insurance does not apply to: . . . “Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard.” This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” (“Exclusion l.”).

16. The Policies contain Exclusion m., which provides in relevant part that: “This insurance does not apply to: . . . “Property damage” to “impaired property” or property that has not been physically injured, arising out of: (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work;” or (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms. This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use” (“Exclusion m.”).

17. The Policies contain Roofing Operations Endorsements, which provides in relevant part that: “The contractor shall cover all “open roofs” if the roof is to be left unattended. Contractor must take “appropriate” steps to determine adverse weather and must take “appropriate” temporary waterproof covering, able to withstand the elements.



1 If contractor fails to do either, any resulting “property damage” to any building or  
 2 structure or its contents will not be covered by this policy” (“Roofing Operations  
 3 Endorsement”).

4 18. The Policies contain Malpractice and Professional Services Exclusions,  
 5 which provides in relevant part that: “This insurance does not apply to: “Bodily injury,”  
 6 “property damage” or “personal and advertising injury” including payment for loss or  
 7 defense costs in connection with any claim made against any insured based upon,  
 8 arising out of, directly or indirectly resulting from, in consequence of, or in any way  
 9 involving the rendering or failure to render any professional service by, but not limited  
 10 to, any Accountant, Architect, Engineer, Insurance Agent or Broker, Lawyer, Medical  
 11 Professional or Real Estate Agent Broker, or any other service that is of a professional  
 12 nature (“Malpractice and Professional Services Exclusion”).”

13 19. The Policies contain Fungi or Bacteria Exclusions, which provides in  
 14 relevant part that: “This insurance does not apply to Fungi Or Bacteria a. “Bodily  
 15 injury” or “property damage” which would not have occurred, in whole or in part, but  
 16 for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure  
 17 to, existence of, or presence of, any “fungi” or bacteria on or within a building or  
 18 structure, including its contents, regardless of whether any other cause, event, material  
 19 or product contributed concurrently or in any sequence to such injury or damage. b.  
 20 Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning  
 21 up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing  
 22 of, or in any way responding to, or assessing the effects of, “fungi” or bacteria, by any  
 23 insured or by any other person or entity (“Fungi or Bacteria Exclusion”).”

24 20. The Policies contain the Anti-Stacking and Nonduplication of Limits of  
 25 Insurance provision under the Policies, which states in relevant part that the limits  
 26 under the Policies “shall not exceed the highest applicable Limit of Insurance available  
 27 under any one Coverage Form, Coverage Part or policy” (“Anti-Stacking provision”).

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21. The Policies contain Supplementary Payments provisions, which provide in relevant part that “We will pay, with respect to any claim we investigate or settle, or any “suit” against an insured we defend: ... e. All court costs taxed against the insured in the “suit.” However, these payments do not include attorneys’ fees or attorneys’ expenses taxed against the insured” (“Supplementary Payments provision”).

22. ATAIN brings the Instant Action to obtain a judicial determination that it owes no potential duty to indemnify CRP and CRAH under the Policies in the Underlying Action because the provisions, exclusions, terms, and conditions of the Policies, including but not limited to the above-cited policy provisions, serve to bar and/or limit coverage for CRP and CRAH under the Policies.

23. ATAIN seeks a declaration with respect to the WINIKOFFS that any determination regarding coverage under the Policies is binding upon them.

### **TENDER OF THE UNDERLYING ACTION**

24. CRP and CRAH tendered the defense and indemnity of the Underlying Action to ATAIN. ATAIN agreed to defend CRP and CRAH in the Underlying Action subject to a reservation of rights, including the right to seek a judicial declaration that there is no duty to indemnify CRP and CRAH under the Policies.

### **FIRST CAUSE OF ACTION**

#### **(Declaratory Judgment –Duty to Indemnify (Breach of Contract, Negligent Misrepresentation, Breach of Civil Code Section 1102, and Rescission Claims) Against All Defendants)**

25. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 24 above.

26. The Breach of Contract, Negligent Misrepresentation, Breach of Civil Code Section 1102, and Rescission Claims in the FAC allege that CRP and CRAH made material misrepresentations and/or concealed material facts from the WINIKOFFS that resulted in damages and/or require the rescission of the Purchase

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1 Agreement. The acts giving rise to these causes of action are not accidental and thus do  
2 not qualify as an “occurrence” as that term is defined in the Policies.

3 27. ATAIN contends that no potential duty to indemnify is triggered as to the  
4 causes of action for Breach of Contract, Negligent Misrepresentation, Breach of Civil  
5 Code Section 1102, and Rescission Claims in the FAC as these causes of action do not  
6 potentially give rise to covered damages caused by an “occurrence” as required by the  
7 Insuring Agreement to the Policies, whereas CRP and CRAH deny this contention.

8 28. A justiciable controversy exists between ATAIN on the one hand, and  
9 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
10 and CRAH under the Policies with respect to the Breach of Contract, Negligent  
11 Misrepresentation, Breach of Civil Code Section 1102, and Rescission Claims.

12 29. ATAIN desires a judicial determination with respect to the rights, duties,  
13 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
14 Breach of Contract, Negligent Misrepresentation, Breach of Civil Code Section 1102,  
15 and Rescission Claims under the terms and conditions of the Policies in order to bind  
16 all Defendants to the determination of this Court. Such a determination is necessary and  
17 appropriate at this time in order that the parties may ascertain their respective rights,  
18 duties, and obligations.

19 30. ATAIN has no adequate remedy at law to resolve the aforesaid  
20 controversy.

## 21 **SECOND CAUSE OF ACTION**

### 22 **(Declaratory Judgment – No Duty to Indemnify Based on Roofing Components** 23 **Claims Against All Defendants)**

24 31. ATAIN incorporates herein by reference, as though fully set forth, the  
25 allegations contained in paragraphs 1 through 30 above.

26 32. The “roofing components” claims in the FAC allege the defective design  
27 and construction of the roofs at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.)  
28 Any damage to the roofs from defective design and/or construction does not result in

1 damages because of “property damage” to which the Policies apply. Therefore, the  
 2 damage to the roof’s aspect of the “roofing components” claims fails to meet the  
 3 Insuring Agreement requirement. Additionally, indemnity coverage for the “roofing  
 4 components” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m.,  
 5 as well as the Roofing Operations Endorsement, the Malpractice and Professional  
 6 Services Exclusion, and the Fungi or Bacteria Exclusion.

7 33. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
 8 for the “roofing components” claims based on the Insuring Agreement requirement,  
 9 Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the  
 10 Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.  
 11 CRP and CRAH deny this contention.

12 34. A justiciable controversy exists between ATAIN on the one hand, and  
 13 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
 14 and CRAH under the Policies with respect to the “roofing components” claims.

15 35. ATAIN desires a judicial determination with respect to the rights, duties,  
 16 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
 17 “roofing components” claims under the terms and conditions of the Policies in order to  
 18 bind all Defendants to the determination of this Court. Such a determination is  
 19 necessary and appropriate at this time in order that the parties may ascertain their  
 20 respective rights, duties, and obligations.

21 36. ATAIN has no adequate remedy at law to resolve the aforesaid  
 22 controversy.

### 23 **THIRD CAUSE OF ACTION**

#### 24 **(Declaratory Judgment – No Duty to Indemnify Based on Exterior Cladding** 25 **and Stucco Claims Against All Defendants)**

26 37. ATAIN incorporates herein by reference, as though fully set forth, the  
 27 allegations contained in paragraphs 1 through 36 above.

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38. The “exterior cladding and stucco” claims in the FAC allege the defective design and construction of the exterior cladding and stucco at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the exterior cladding and stucco from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the exterior cladding and stucco aspect of the “exterior cladding and stucco” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “exterior cladding and stucco” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

39. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “exterior cladding and stucco” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

40. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “exterior cladding and stucco” claims.

41. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “exterior cladding and stucco” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

42. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

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**FOURTH CAUSE OF ACTION**

**(Declaratory Judgment – No Duty to Indemnify Based on Flashing Claims  
Against All Defendants)**

43. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 42.

44. The “flashing” claims in the FAC allege the defective design and construction of the roofs at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the flashing from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the flashing aspect of the “flashing” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “flashing” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

45. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “flashing” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

46. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “flashing” claims.

47. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “flashing” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

48. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

## FIFTH CAUSE OF ACTION

**(Declaratory Judgment – No Duty to Indemnify Based on Decks Claims  
Against All Defendants)**

49. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 48 above.

50. The “decks” claims in the FAC allege the defective design and construction of the roofs at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the decks from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the decks aspect of the “decks” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “decks” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

51. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “decks” claim based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

52. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “decks” claims.

53. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “decks” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and

appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

54. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

### **SIXTH CAUSE OF ACTION**

#### **(Declaratory Judgment – No Duty to Indemnify Based on Balconies Claims Against All Defendants)**

55. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 54 above.

56. The “balconies” claims in the FAC allege the defective design and construction of the balconies at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the balconies from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the balconies aspect of the “balconies” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “balconies” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

57. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “balconies” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

58. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “balconies” claims.

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59. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “balconies” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

60. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

### **SEVENTH CAUSE OF ACTION**

#### **(Declaratory Judgment – No Duty to Indemnify Based on Windows Claims Against All Defendants)**

61. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 60 above.

62. The “windows” claims in the FAC allege the defective design and construction of the windows at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the windows from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the windows aspect of the “windows” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “windows” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

63. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “windows” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

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64. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN's obligation to indemnify CRP and CRAH under the Policies with respect to the "windows" claims.

65. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the "windows" claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

66. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

### **EIGHTH CAUSE OF ACTION**

#### **(Declaratory Judgment – No Duty to Indemnify Based on Sliding Glass Doors Claims Against All Defendants)**

67. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 66 above.

68. The "sliding glass doors" claims in the FAC allege the defective design and construction of the sliding glass doors at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the sliding glass doors from their defective design and/or construction does not result in damages because of "property damage" to which the Policies apply. Therefore, the damage to the sliding glass doors aspect of the "sliding glass doors" claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the "sliding glass doors" claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

69. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the "sliding glass doors" claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the

1 Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.  
 2 CRP and CRAH deny this contention.

3 70. A justiciable controversy exists between ATAIN on the one hand, and  
 4 CRP and CRAH on the other hand, concerning ATAIN's obligation to indemnify CRP  
 5 and CRAH under the Policies with respect to the "sliding glass doors" claims.

6 71. ATAIN desires a judicial determination with respect to the rights, duties,  
 7 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
 8 "sliding glass doors" claims under the terms and conditions of the Policies in order to  
 9 bind all Defendants to the determination of this Court. Such a determination is  
 10 necessary and appropriate at this time in order that the parties may ascertain their  
 11 respective rights, duties, and obligations.

12 72. ATAIN has no adequate remedy at law to resolve the aforesaid  
 13 controversy

### 14 **NINTH CAUSE OF ACTION**

#### 15 **(Declaratory Judgment – No Duty to Indemnify Based on Structural Claims** 16 **Against All Defendants)**

17 73. ATAIN incorporates herein by reference, as though fully set forth, the  
 18 allegations contained in paragraphs 1 through 72 above.

19 74. The "structural" claims in the FAC allege the defective design and  
 20 construction of the structure of the Property. (*See* para. 18 of the FAC at p. 4 *supra*.)  
 21 Any damage to the structure of the Property from defective design and/or construction  
 22 does not result in damages because of "property damage" to which the Policies apply.  
 23 Therefore, the damage to the structure of the Property aspect of the "structural" claims  
 24 fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for  
 25 the "structural" claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m.,  
 26 as well as the Roofing Operations Endorsement, the Malpractice and Professional  
 27 Services Exclusion, and the Fungi or Bacteria Exclusion.

28 ///

75. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “structural” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

76. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “structural” claims.

77. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “structural” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

78. ATAIN has no adequate remedy at law to resolve the aforesaid controversy.

### **TENTH CAUSE OF ACTION**

#### **(Declaratory Judgment – No Duty to Indemnify Based on Electrical Claims Against All Defendants)**

79. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 78 above.

80. The “electrical” claims in the FAC allege the defective design and construction of the electrical system at the Property. (*See* para. 18 of the FAC at p. 4 *supra*.) Any damage to the electrical system from defective design and/or construction does not result in damages because of “property damage” to which the Policies apply. Therefore, the damage to the electrical system aspect of the “electrical” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “electrical” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as

1 well as the Roofing Operations Endorsement, the Malpractice and Professional Services  
2 Exclusion, and the Fungi or Bacteria Exclusion.

3 81. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
4 for the “electrical” claims based on the Insuring Agreement requirement, Exclusions j.  
5 (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and  
6 Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH  
7 deny this contention.

8 82. A justiciable controversy exists between ATAIN on the one hand, and  
9 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
10 and CRAH under the Policies with respect to the “electrical” claims.

11 83. ATAIN desires a judicial determination with respect to the rights, duties,  
12 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
13 “electrical” claims under the terms and conditions of the Policies in order to bind all  
14 Defendants to the determination of this Court. Such a determination is necessary and  
15 appropriate at this time in order that the parties may ascertain their respective rights,  
16 duties, and obligations.

17 84. ATAIN has no adequate remedy at law to resolve the aforesaid  
18 controversy.

### 19 **ELEVENTH CAUSE OF ACTION**

#### 20 **(Declaratory Judgment – No Duty to Indemnify Based on Mechanical Claims** 21 **Against All Defendants)**

22 85. ATAIN incorporates herein by reference, as though fully set forth, the  
23 allegations contained in paragraphs 1 through 84 above.

24 86. The “mechanical” claims in the FAC allege the defective design and  
25 construction of the mechanical system at the Property. (*See* para. 18 of the FAC at p. 4  
26 *supra*.) Any damage to the mechanical system from defective design and/or  
27 construction does not result in damages because of “property damage” to which the  
28 Policies apply. Therefore, the damage to the mechanical system aspect of the

1 “mechanical” claims fails to meet the Insuring Agreement requirement. Additionally,  
 2 indemnity coverage for the “mechanical” claims under the Policies is barred by  
 3 Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the  
 4 Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

5 87. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
 6 for the “mechanical” claims based on the Insuring Agreement requirement, Exclusions  
 7 j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and  
 8 Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH  
 9 deny this contention.

10 88. A justiciable controversy exists between ATAIN on the one hand, and  
 11 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
 12 and CRAH under the Policies with respect to the “mechanical” claims.

13 89. ATAIN desires a judicial determination with respect to the rights, duties,  
 14 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
 15 “mechanical” claims under the terms and conditions of the Policies in order to bind all  
 16 Defendants to the determination of this Court. Such a determination is necessary and  
 17 appropriate at this time in order that the parties may ascertain their respective rights,  
 18 duties, and obligations.

19 90. ATAIN has no adequate remedy at law to resolve the aforesaid  
 20 controversy.

## 21 **TWELFTH CAUSE OF ACTION**

### 22 **(Declaratory Judgment – No Duty to Indemnify Based on HVAC Claims** 23 **Against All Defendants)**

24 91. ATAIN incorporates herein by reference, as though fully set forth, the  
 25 allegations contained in paragraphs 1 through 90 above.

26 92. The “HVAC” claims in the FAC allege the defective design and  
 27 construction of the HVAC system at the Property. (*See* para. 18 of the FAC at p. 4  
 28 *supra.*) Any damage to the HVAC system from defective design and/or construction



1 does not result in damages because of “property damage” to which the Policies apply.  
 2 Therefore, the damage to the HVAC system aspect of the “HVAC” claims fails to meet  
 3 the Insuring Agreement requirement. Additionally, indemnity coverage for the  
 4 “HVAC” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as  
 5 well as the Roofing Operations Endorsement, the Malpractice and Professional Services  
 6 Exclusion, and the Fungi or Bacteria Exclusion.

7 93. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
 8 for the “HVAC” claims based on the Insuring Agreement requirement, Exclusions j.  
 9 (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and  
 10 Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH  
 11 deny this contention.

12 94. A justiciable controversy exists between ATAIN on the one hand, and  
 13 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
 14 and CRAH under the Policies with respect to the “HVAC” claims.

15 95. ATAIN desires a judicial determination with respect to the rights, duties,  
 16 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
 17 “HVAC” claims under the terms and conditions of the Policies in order to bind all  
 18 Defendants to the determination of this Court. Such a determination is necessary and  
 19 appropriate at this time in order that the parties may ascertain their respective rights,  
 20 duties, and obligations.

21 96. ATAIN has no adequate remedy at law to resolve the aforesaid  
 22 controversy.

### 23 **THIRTEENTH CAUSE OF ACTION**

#### 24 **(Declaratory Judgment – No Duty to Indemnify Based on Plumbing Claims** 25 **Against All Defendants)**

26 97. ATAIN incorporates herein by reference, as though fully set forth, the  
 27 allegations contained in paragraphs 1 through 96 above.

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1           98. The “plumbing” claims in the FAC allege the defective design and  
 2 construction of the plumbing system at the Property. (*See* para. 18 of the FAC at p. 4  
 3 *supra*.) Any damage to the plumbing system from defective design and/or construction  
 4 does not result in damages because of “property damage” to which the Policies apply.  
 5 Therefore, the damage to the plumbing system aspect of the “plumbing” claims fails to  
 6 meet the Insuring Agreement requirement. Additionally, indemnity coverage for the  
 7 “plumbing” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as  
 8 well as the Roofing Operations Endorsement, the Malpractice and Professional Services  
 9 Exclusion, and the Fungi or Bacteria Exclusion.

10           99. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
 11 for the “plumbing” claims based on the Insuring Agreement requirement, Exclusions j.  
 12 (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and  
 13 Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH  
 14 deny this contention.

15           100. A justiciable controversy exists between ATAIN on the one hand, and  
 16 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
 17 and CRAH under the Policies with respect to the “plumbing” claims.

18           101. ATAIN desires a judicial determination with respect to the rights, duties,  
 19 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
 20 “plumbing” claims under the terms and conditions of the Policies in order to bind all  
 21 Defendants to the determination of this Court. Such a determination is necessary and  
 22 appropriate at this time in order that the parties may ascertain their respective rights,  
 23 duties, and obligations.

24           102. ATAIN has no adequate remedy at law to resolve the aforesaid  
 25 controversy.

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**FOURTEENTH CAUSE OF ACTION**

**(Declaratory Judgment – No Duty to Indemnify Based on Mold and Fungal Growth Claims Against All Defendants)**

103. ATAIN incorporates herein by reference, as though fully set forth, the allegations contained in paragraphs 1 through 102 above.

104. The “mold and fungal growth” claims in the FAC allege that the defective design and construction of the Property resulted in mold and fungal growth. (*See* para. 18 of the FAC at p. 4 *supra*.) Any mold and fungal growth damage to the Property does not result in damages because of “property damage” to which the Policies apply. Therefore, the “mold and fungal growth” claims fails to meet the Insuring Agreement requirement. Additionally, indemnity coverage for the “mold and fungal growth” claims under the Policies is barred by Exclusions j. (5), j. (6), l., and m., as well as the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion.

105. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH for the “mold and fungal growth” claims based on the Insuring Agreement requirement, Exclusions j. (5), j. (6), l., and m., the Roofing Operations Endorsement, the Malpractice and Professional Services Exclusion, and the Fungi or Bacteria Exclusion. CRP and CRAH deny this contention.

106. A justiciable controversy exists between ATAIN on the one hand, and CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP and CRAH under the Policies with respect to the “mold and fungal growth” claims.

107. ATAIN desires a judicial determination with respect to the rights, duties, and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the “mold and fungal growth” claims under the terms and conditions of the Policies in order to bind all Defendants to the determination of this Court. Such a determination is necessary and appropriate at this time in order that the parties may ascertain their respective rights, duties, and obligations.

1 108. ATAIN has no adequate remedy at law to resolve the aforesaid  
2 controversy.

### 3 **FIFTEENTH CAUSE OF ACTION**

#### 4 **(Declaratory Judgment – No Duty to Indemnify Based on Attorney’s Fees** 5 **Claims Against All Defendants)**

6 109. ATAIN incorporates herein by reference, as though fully set forth, the  
7 allegations contained in paragraphs 1 through 108 above.

8 110. The “Attorney’s Fees” claims in the FAC allege that the CRP and CRAH  
9 are liable for the attorney’s fees incurred by the WINIKOFFS in the Underlying Action.  
10 However, the Supplementary Payments provision under the Policies bars coverage for  
11 any award of attorney’s fees against CRP and CRAH in the Underlying Action.  
12 Therefore, ATAIN has no duty to indemnify CRP and CRAH against the “Attorney’s  
13 Fees” claims.

14 111. ATAIN avers that it owes no potential duty to indemnify CRP and CRAH  
15 for the “Attorney’s Fees” claims. CRP and CRAH deny this contention.

16 112. A justiciable controversy exists between ATAIN on the one hand, and  
17 CRP and CRAH on the other hand, concerning ATAIN’s obligation to indemnify CRP  
18 and CRAH under the Policies with respect the “Attorney’s Fees” claims.

19 113. ATAIN desires a judicial determination with respect to the rights, duties,  
20 and obligations of ATAIN as to the duty to indemnify CRP and CRAH against the  
21 “Attorney’s Fees” claims in the Underlying Action in order to bind CRP, CRAH, and  
22 the WINIKOFFS to the determination of the Court. Such a determination is necessary  
23 and appropriate at this time in order that the parties may ascertain their respective  
24 rights, duties and obligations.

25 114. ATAIN has no adequate remedy at law to resolve the aforesaid  
26 controversy.

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1        WHEREFORE, ATAIN prays for judgment against CRP, CRAH, and the  
2 WINIKOFFS as follows:

3            1.        On the First Cause of Action for a declaration of this Court binding  
4 as to all Defendants which directs that the Policies provide no duty to indemnify  
5 Defendants in connection with the Breach of Contract, Negligent  
6 Misrepresentation, Breach of Civil Code Section 1102, and Rescission claims;

7            2.        On the Second Cause of Action for a declaration of this Court  
8 binding as to all Defendants which directs that the Policies provide no duty to  
9 indemnify Defendants in connection with the roofing components claims;

10           3.        On the Third Cause of Action for a declaration of this Court binding  
11 as to all Defendants which directs that the Policies provide no duty to indemnify  
12 Defendants in connection with the exterior cladding and stucco claims;

13           4.        On the Fourth Cause of Action for a declaration of this Court  
14 binding as to all Defendants which directs that the Policies provide no duty to  
15 indemnify Defendants in connection with the flashing claims;

16           5.        On the Fifth Cause of Action for a declaration of this Court binding  
17 as to all Defendants which directs that the Policies provide no duty to indemnify  
18 Defendants in connection with the decks claims;

19           6.        On the Sixth Cause of Action for a declaration of this Court binding  
20 as to all Defendants which directs that the Policies provide no duty to indemnify  
21 Defendants in connection with the balconies claims;

22           7.        On the Seventh Cause of Action for a declaration of this Court  
23 binding as to all Defendants which directs that the Policies provide no duty to  
24 indemnify Defendants in connection with the windows claims;

25           8.        On the Eighth Cause of Action for a declaration of this Court  
26 binding as to all Defendants which directs that the Policies provide no duty to  
27 indemnify Defendants in connection with the sliding glass doors claims;

28        ///

1           9.     On the Ninth Cause of Action for a declaration of this Court binding  
2 as to all Defendants which directs that the Policies provide no duty to indemnify  
3 Defendants in connection with the structural claims;

4           10.    On the Tenth Cause of Action for a declaration of this Court binding  
5 as to all Defendants which directs that the Policies provide no duty to indemnify  
6 Defendants in connection with the electrical claims;

7           11.    On the Eleventh Cause of Action for a declaration of this Court  
8 binding as to all Defendants which directs that the Policies provide no duty to  
9 indemnify Defendants in connection with the mechanical claims;

10          12.    On the Twelfth Cause of Action for a declaration of this Court  
11 binding as to all Defendants which directs that the Policies provide no duty to  
12 indemnify Defendants in connection with the HVAC claims;

13          13.    On the Thirteenth Cause of Action for a declaration of this Court  
14 binding as to all Defendants which directs that the Policies provide no duty to  
15 indemnify Defendants in connection with the plumbing claims;

16          14.    On the Fourteenth Cause of Action for a declaration of this Court  
17 binding as to all Defendants which directs that the Policies provide no duty to  
18 indemnify Defendants in connection with the mold and fungal growth claims;

19          15.    On the Fifteenth Cause of Action for a declaration of this Court  
20 binding as to all Defendants which directs that the Policies provide no duty to  
21 indemnify Defendants in connection with Attorney's Fees claims;

22          16.    For the Court to advance this cause of action on the Court's docket  
23 as provided by Rule 57 of the Federal Rules of Civil Procedure;

24          17.    To enjoin these Defendants from initiating or prosecuting any suit  
25 or action against ATAIN, including post judgment remedial action or  
26 garnishment, until such time as the Court has declared the rights and duties of the  
27 parties requested above;

28    ///



1           18. For costs of suit incurred herein, including attorneys' fees and costs,  
2           and

3           19. For such other relief as the Court may deem just and proper.  
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5 DATED: July 27, 2020

LEWIS BRISBOIS BISGAARD & SMITH LLP  
THOMAS E. MULVIHILL  
JERRY GARCIA

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9           By:           /s/ Thomas E. Mulvihill            
10                       Thomas E. Mulvihill  
11                       Attorneys for Plaintiff  
12                       ATAIN SPECIALTY INSURANCE COMPANY  
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